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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW SASSON, Defendant and Appellant.	B148259 (Super. Ct. No. LA035483)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. John S. Fisher, Judge. Affirmed in part, reversed in part.

Anne V. Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Brad D. Levenson and Nora Genelin, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Matthew Sasson challenges his convictions for receiving stolen property, unlawfully taking or driving a vehicle, grand theft auto; and for possessing methamphetamine, a firearm and ammunition on the ground the trial court erroneously admitted irrelevant and inflammatory evidence of his membership in a white supremacist gang and possession of white supremacist or neo-Nazi materials. He also argues the prosecutor improperly argued matters outside the record and belatedly disclosed the existence of a witness; defense counsel rendered ineffective assistance, and he was improperly convicted of stealing and receiving the same car.

We conclude the trial court prejudicially erred in admitting certain items of evidence pertaining to appellant's white supremacist and neo-Nazi views and gang membership, as their slight probative value was substantially outweighed by the probability that their admission would create a risk of undue prejudice. While most of the prosecutor's argument was proper, her statement regarding the degree of proof required to obtain a search warrant improperly suggested the existence of persuasive inculpatory facts not presented to the jury. Although defense counsel's failure to request the jury be admonished to disregard the prosecutor's remark bars appellant's prosecutorial misconduct claim, counsel's omission constituted ineffective assistance of counsel and requires reversal. The tardy disclosure of a prosecution witness, however, was harmless. Finally, appellant was improperly convicted of stealing and receiving the same vehicle.

BACKGROUND AND PROCEDURAL HISTORY

David Lampert's Jeep Cherokee and Rick Barzilli's BMW were stolen from their shared tandem parking space in a secured condominium parking garage sometime between the afternoon of March 5 and the morning of March 6, 2000. Among the items contained in Barzilli's car at the time of the theft was a laptop computer.

Barzilli's BMW was found the next day without its stereo, speakers, and rear seat.

Also missing were the laptop and other personal property Barzilli had left inside the car.

California Highway Patrol Officer Michael Nibarger found Lampert's Jeep after it ran off the 118 Freeway and flipped over in the early morning hours of March 8, 2000. Nibarger and his partner were unable to find the Jeep's driver. Inside the Jeep they found a metal briefcase on which were written "Bones," "SS," and "SFV." Inside the briefcase they found various types of ammunition; four syringes, one of which contained a usable quantity of methamphetamine; address books and a baseball cap on the bill of which were written "Bones," "SFV," and a symbol or word associated with Nazis.[1] The officers also found a loaded Colt .45 automatic handgun; a key-making kit; color photocopies of artwork depicting swastikas, soldiers, and the name Adolf Hitler (People's Exhibit 5); a sketchbook containing, according to Officer Nibarger, drawings of "bondage, white supremacist type of pictures" (People's Exhibit 4). Nibarger did not recall finding a pager, and did not list one on the inventory of items he booked into evidence. Lampert testified that none of the items found inside the Jeep on March 8 belonged to him or were in the vehicle before it was stolen.

While Pablo Castellanos waited in line inside a bank on March 11, 2000, he saw someone driving away in his burgundy Toyota 4-Runner. He ran outside and realized that the thief was the same man he had seen a few minutes earlier in the parking lot of another bank. At that time, Castellanos and the man were walking toward the 4-Runner when they bumped into one another. When Castellanos got in his vehicle, the man turned and walked away. Castellanos could not specifically identify appellant as the man who stole his 4-Runner, but he looked similar. On cross-examination, he testified the thief was about the same height or a little taller than defense counsel, who told the court he was 5 feet 6½ inches tall.

On March 20, 2000, appellant was arrested after a three-hour standoff. Los

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[1] Officer Nibarger described the cap as bearing "the Nazi moniker."

Angeles Police Department Detective Rocky Sherwood interviewed appellant, who was known as "Bones," at the police station, but did not tape the interview or obtain a signed statement. Appellant admitted stealing the BMW while his companion stole the Jeep Cherokee. Appellant told Sherwood he removed the rear seat and stereo system from the BMW. He further admitted driving the Jeep on the 118 Freeway when he fell asleep and rolled the vehicle. Appellant admitted the metal briefcase, hat, Colt .45, ammunition, syringes, address books and Nazi photos were his, but said the key kit and sketchbook belonged to Ray Mack. Appellant also said he had driven a rust-colored 4-Runner or Pathfinder someone else had stolen. He said he abandoned it near a white office building at an industrial area near Corbin and Lassen. Appellant told Sherwood he was willing to confess because he missed prison.

Randy Vera, an employee of the Department of Motor Vehicles, sat in on Sherwood's interview with appellant to witness any admission appellant might make. Sherwood's report, however, did not mention Vera's presence. Neither Vera nor Sherwood took any notes, although the interview lasted about two hours. Sherwood testified in his experience, suspects would not talk if they saw a tape recorder or note-taking. On cross-examination, Sherwood admitted there were interview rooms in the police station equipped to surreptitiously tape an interview, but the room he used was not one of them.

Appellant told Sherwood he had stayed "off and on" at a particular residence. Ten days after appellant's arrest, the police searched the residence, which was apparently the home of "Miss Ward" and her mother. They found the laptop from Barzilli's car and Castellanos's phone bill. A resident of the house told Sherwood appellant left the bill there. Castellanos testified the phone bill was in his truck when it was stolen. Sherwood "ran" Castellanos's name and learned his truck had been stolen. The next day, the police found Castellanos's Toyota alongside a white building near Corbin and Lassen, just as appellant had described. On cross-examination, Sherwood testified that on March 9,

2000, two days before the theft of Castellanos's vehicle, he heard appellant was driving a rust-colored SUV.

Sherwood testified a pager was among the items recovered from the Jeep on March 8 and given to him by the CHP. He released the pager to appellant's girlfriend, Trista Curtis, upon proof she owned it. Defense witness Doron Mansur, the regional manager for J&J Beepers, testified that his company had sold the pager in question to Curtis on March 9, 2000, a day after the recovery of the Jeep.

Appellant's parole agent, Bryan Long, testified appellant told him he was affiliated with a white supremacist prison gang.

A jury convicted appellant of possession of a firearm and ammunition by a felon, possession of methamphetamine, grand theft of the Jeep and BMW, unlawful taking or driving of the Toyota, and two counts of receiving stolen property, namely the Jeep and Toyota. The court then found appellant had suffered two prior serious or violent felony convictions and had served six prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). Appellant was sentenced to a term of 25 years to life in prison, under the Three Strikes Law, for possession of a firearm. Terms on all other counts were either stayed or run concurrently with the Three Strikes term.

DISCUSSION

1. Admitting pictures of Nazi flags, testimony regarding the contents of a sketchbook, and testimony about appellant's membership in a white supremacist gang was error.

Appellant contends the trial court erred in admitting evidence of his white supremacist views and gang membership. In particular, he complains of admission of the metal briefcase, baseball cap, sketchbook, photographs of swastikas and Hitler and testimony by his parole agent about his membership in a white supremacist prison gang. He argues this evidence was irrelevant, highly inflammatory and cumulative, as he admitted the property in the Jeep was his.

Only relevant evidence is admissible. (Evid. Code, § 350.) Even relevant evidence, however, may be excluded where its probative value is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, undue consumption of time, or jury confusion. (Evid. Code, § 352.) On appeal, the trial court's rulings on the admissibility of evidence, including relevance and admissibility under Evidence Code section 352, are reviewed for abuse of discretion. (See, e.g., *People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

a. The briefcase and baseball cap were properly admitted.

Appellant's moniker was written on the briefcase and baseball cap. These items thus appeared to belong to appellant. Because they were found in the Jeep, the items were relevant to show appellant was in possession of the vehicle at the time of the accident, which would in turn tend to show he participated in its theft or received it as stolen property. While appellant admitted to Sherwood he was driving the Jeep at the time of the accident and his companion stole it in conjunction with his theft of the BMW, the cap and briefcase were not cumulative because appellant's defense was largely based upon the theory that Sherwood fabricated his confession. Because the confession was not recorded, appellant did not write or sign a statement, Sherwood failed to note Vera's presence in his report, and portions of Sherwood's testimony were inconsistent and implausible, Sherwood's credibility was subject to some doubt. Accordingly, evidence of the cap and briefcase was of strong probative value. The presence of a Nazi emblem on the cap and "SS"[2] on the briefcase undoubtedly created a risk of prejudice. In and of themselves, however, the briefcase and hat were legal, utilitarian and innocuous items. Neither object depicted or suggested white supremacist or neo-Nazi activities or criminal propensity. Each object was tainted by a single word

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[2] Common reference to the elite Nazi Schutzstaffel group.

or symbol marked upon it, and one of those markings—the "SS" on the briefcase—was subject to differing interpretations. Aside from Nibarger's characterization of the word or symbol on the cap as having to do with Nazis, there was no testimony regarding the meaning or significance of the markings. Accordingly, given the extremely high degree of relevance of the briefcase and cap and the limited scope of the potential prejudice, the trial court's decision to admit the briefcase and cap was not arbitrary, capricious, or patently absurd.

b. The sketchbook, photographs and gang membership testimony should have been excluded.

We have examined People's Exhibits 4 and 5. Exhibit 4, the sketchbook, contains a number of charcoal, pastel, and crayon drawings of nude or partially nude women bound with ropes. A single sketch depicts a woman with swastikas on her forehead and thigh and "property of Hitler" written on her thigh. Most of the sketches are signed "Ray Mack." Exhibit 5 consists of three pictures that appear to be color photocopies of artwork or small posters. Exhibit 5-C depicts soldiers on a battlefield beneath a Third Reich infantry unit flag, a square flag bearing five swastikas, the German Iron Cross and an eagle.[3] At the top appears the label "Infanterie" and at the bottom is the name Gottfried Klein.[4] Exhibit 5-A appears to simply be a cutout copy of the flag in 5-C. Exhibit 5-B appears to depict Hitler's personal flag. At the top of the pole is an eagle clutching a wreath surrounding a swastika, which is atop an "Adolf Hitler" nameplate. Hanging from a horizontal bar beneath the nameplate is a square flag containing a large

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[3] See http://www.crwflags.com/fotw/flags/de^933ar.html#inf.

[4] The image in People's Exhibit 5-C appears to have been taken from a Nazi-era postcard, one in a series depicting various military units. See http://www.calvin.edu/academic/cas/gpa/images/postcard/pak.jpg for a very similar image depicting anti-tank gunners, also signed "Gottfried Klein."

centered swastika within a wreath, and in each corner an eagle clutching a wreath containing a swastika.[5] The images in People's Exhibit 5 are unmistakably Nazi in nature.

Neither the sketchbook nor the artwork constituting People's Exhibit 5 bears any marks identifying them as appellant's. Sherwood testified appellant denied ownership of the sketchbook and all signed sketches bear another person's name. These exhibits connect appellant to the Jeep only through the parole agent's testimony that appellant belonged to a white supremacist prison gang. Appellant was thus a member of a discrete group who might have possessed these items.[6] To the extent this evidence linked appellant to the Jeep, it was cumulative, as the cap and briefcase served the same purpose.

Weighed against the limited probative value of People's Exhibit 5 and the gang membership testimony are their highly inflammatory nature. Evidence of membership in an ordinary street gang carries such a high potential for improperly prejudicing the jury that courts must carefully scrutinize evidence before admitting it. (*People v. Champion* (1995) 9 Cal.4th 879, 922.) The items at issue, however, were far more inflammatory than evidence of mere membership in a criminal street gang. People's Exhibit 5, in conjunction with the parole agent's testimony, was potent evidence that appellant was not just a gang member, but also a neo-Nazi and white supremacist, thus implying that appellant hated all non-white, non-Christian people and would support or participate in a genocidal campaign against such people. Admission of People's Exhibit 5 and the gang testimony potentially created at least two types of prejudice: bias against appellant and

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5 See http://www.crwflags.com/fotw/flags/de1935ah.html.

6 The prosecutor never suggested the vehicle thefts were in any way related to gang activity.

an inference of criminal propensity. The risk of bias stemmed from the likelihood some or all jurors would be repulsed by appellant's apparent hatred of everyone other than white Christians and fearful that if appellant went free, he would carry out his neo-Nazi, white supremacist views by committing hate crimes. The jury might also have inferred that appellant was predisposed to commit crimes, as gangs are commonly associated by the public with a variety of crimes, most notably drive-by shootings, narcotics sales, and terrorist threats, and white supremacists and neo-Nazis are often linked to hate crimes.[7] The evidence was highly likely to cause the jury to pre-judge appellant on the basis of extraneous factors. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) The risk of undue prejudice thus substantially outweighed the weak probative value of the evidence. The trial court abused its discretion in admitting People's Exhibit 5 and parole agent's testimony. The error was exacerbated by the trial court's failure to constrain the jury's consideration of the evidence in controversy by means of a limiting instruction.

The same analysis applies with equal force to the sketchbook and testimony regarding its contents. The sketchbook, however, was not actually admitted in evidence. It was marked for identification and shown to Lampert and Nibarger during their examination. Nibarger described the contents of the sketchbook in terms likely to be emblazoned in jurors' memories: scenes of bondage and "white supremacist type" pictures. The prosecutor subsequently declined to move it into evidence, but the trial court did not inform the jury that it had been withdrawn or provide the jury with any other information from which the jury could infer that the sketchbook was not part of the evidence. The court also did not direct the jury to disregard testimony about the contents

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[7] In addition, the gang membership evidence necessarily revealed that appellant had been in prison. However, this likely created little or no additional prejudice because appellant stipulated, for purposes of the firearm and ammunition charges, that he had suffered a prior felony conviction, and the jury would likely assume the existence of concomitant incarceration.

of the sketchbook. Thus, for purposes of our analysis, the sketchbook was effectively part of the evidence before the jury.

The trial court's error in failing to exclude People's Exhibits 4 and 5 and testimony regarding those exhibits and appellant's membership in a white supremacist gang does not require reversal unless it is reasonably probable that a result more favorable to appellant would have occurred if the evidence had been excluded. (*People v. Venegas* (1998) 18 Cal.4th 47, 93; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

With respect to appellant's convictions for possessing a firearm, ammunition and methamphetamine (counts one through three), there is no reasonable probability appellant would have obtained a more favorable result if the trial court excluded People's Exhibits 4 and 5 and the gang membership testimony. The ammunition and syringes were found in the metal briefcase bearing appellant's nickname. The briefcase, along with the baseball cap, provided strong evidence appellant was in possession of the Jeep and the gun found therein. Thus, it is not reasonably probable appellant would have obtained a more favorable result had the evidence in issue been excluded.

The error also was harmless with respect to the counts pertaining to the Jeep (counts five and eight). The presence of the briefcase and baseball cap in the Jeep provided strong proof he possessed the vehicle for some period prior to the accident. Appellant's flight from the scene of the accident was strongly inferred consciousness of guilt, i.e., he knew the vehicle was stolen. Thus, there was overwhelming proof he at least received the Jeep as stolen property. Moreover, the jury was properly instructed that conscious possession of stolen property, with slight corroborating evidence, was sufficient to support an inference of guilt of theft of the vehicle. (CALJIC No. 2.15; *People v. McFarland* (1962) 58 Cal.2d 748, 754-755.) It is not reasonably probable the jury's verdict on the grand theft or receiving stolen property counts pertaining to the Jeep was tainted by bias against appellant or an inference of criminal propensity. Accordingly, there is no reasonable probability appellant would have received a more

favorable verdict on these charges had the trial court excluded People's Exhibits 4 and 5 and the gang membership evidence.

Appellant left no possessions, fingerprints or other clues to his identity in the BMW or Toyota. For the charges pertaining to these vehicles (counts four, six and ten), the prosecution's proof consisted primarily of Sherwood's testimony regarding appellant's confession. As previously noted, appellant claimed Sherwood fabricated the confession. The absence of a recording or written statement rendered this claim possible, and several oddities lent credibility to the contention. With respect to the interrogation process, Sherwood claimed he did not tape it or take notes during the questioning because doing so would likely have made appellant reluctant to speak. However, he admitted on cross-examination the police station where he interviewed appellant contained interview rooms in which an interview could be surreptitiously recorded. Sherwood admitted making no effort to use one of the rooms, but instead simply brought in Randy Vera to witness appellant's interview. Given the importance Sherwood attached to the presence of a witness to confirm the substance of any statement obtained, his failure to mention Vera's presence in his report detracts from the credibility of his testimony. Furthermore, several of Sherwood's statements or statements he attributed to appellant appear to contradict other evidence. Sherwood testified appellant said he confessed because he missed being in prison. However, a person who wanted to return to prison would not be expected to engage the police in a three-hour standoff before permitting them to arrest him. Sherwood further testified that on March 9, 2000, he heard appellant was driving a rust-colored SUV. The term "rust-colored SUV" was used throughout the trial to refer to Castellanos's Toyota. However, Castellanos's vehicle was not stolen until March 11, 2000. In addition, Sherwood testified Curtis's pager was one of the items he received from CHP, yet Nibarger did not recall finding a pager and did not list it on the property inventory sheet. Mansur, an apparently unbiased defense witness, testified his company sold Curtis the

pager on March 9, a full day after its purported recovery from the Jeep. Given these factors, it is reasonably probable a jury untainted by evidence of appellant's neo-Nazi views and gang membership would have doubted Sherwood's credibility, and disbelieved some or all of his testimony regarding appellant's alleged confession.

Aside from the confession, the only evidence linking appellant to the theft of the BMW was that it was apparently stolen at the same time as the Jeep and the presence of Barzilli's laptop in a residence appellant sometimes occupied. However, other people resided in the home, and the prosecutor introduced no evidence tending to show appellant was the person who brought the laptop to the home. Moreover, the only evidence linking appellant to the residence searched was appellant's alleged admission to Sherwood that he had stayed there "off and on." This admission, however, was subject to the same credibility problems as the remainder of appellant's confession. Furthermore, appellant was not charged with the theft of the laptop or receiving the stolen laptop. Although the jury could reasonably infer appellant's theft of the car from his possession of an item previously contained in it, the series of necessary inferences, coupled with gaps in the prosecution's evidence, left the prosecution with a weak case regarding the BMW. In view of these factors, it is reasonably probable that, in the absence of the improper influences of People's Exhibits 4 and 5 and the gang membership evidence, the jury could have concluded there was insufficient evidence to prove, beyond a reasonable doubt, appellant stole the BMW. Thus, the trial court's error was prejudicial and requires reversal of the conviction for grand theft of the BMW (count four).

Essentially the same problems exist with respect to the Toyota counts. Apart from the confession, only Castellanos's phone bill linked appellant to that vehicle. Although Sherwood testified, over defense counsel's objection, that a resident of the house told him appellant left the phone bill behind, appellant was not charged with possession of the phone bill or receiving the stolen bill. While appellant's possession of the bill constitutes some evidence appellant stole the vehicle, there is a reasonable

probability that, absent the improperly admitted evidence, the jury would have concluded Sherwood made up appellant's purported admissions regarding the Toyota. This conclusion is more probable in light of the credibility problem in Sherwood's testimony that, two days before the vehicle was stolen, he obtained information about appellant driving it. On balance, we conclude it is reasonably probable that, without the prejudicial influence of the improperly admitted evidence, the jury could have concluded that there was insufficient evidence to prove, beyond a reasonable doubt, that appellant unlawfully drove or received the Toyota. The error in admitting this evidence thus requires reversal of appellant's conviction for these charges (counts six and ten).

2. The prosecutor engaged in misconduct in one portion of her closing argument.

Appellant contends the prosecutor engaged in misconduct at various times during her argument.

a. Argument regarding the absence of a recording or written statement of appellant's confession was not misconduct.

Appellant first complains the prosecutor used faulty reasoning and speculation, argued facts outside the evidence, and ignored other evidence when she made the following argument:

> "Why didn't Detective Sherwood record the statement? Number one, if the detective would have recorded the statement, there would have been a problem with the recording. They would have made an issue over the recording. The product of the recording, it wasn't good enough, they couldn't hear everything. Or why didn't you have him sign anything after you recorded it? That's the first thing. Second thing is, like Detective Sherwood told you, as soon as you turn on a tape recorder people stop talking and that's human nature. I was just in my office yesterday, somebody—one of my co-workers comes into my office and says he is

coming close to his closing argument, he is in a very high-profile case. I said are you nervous? I'm nervous, he says, because the LA Times will be there, and every single word I say is going to be written down on the front page of the newspaper. Human nature. People don't like to have what they say recorded. Because they know that it is set in stone once it's recorded. Same thing with writing. I mean, if there was a written admission they would say why didn't you record it. Now, written admission? What's the problem there? Well, what happens when you walk into a doctor's office? You walk into your dentist's office, they have you sign a waiver form. What's the first thing in your head? I have a cavity, and if I walk out paralyzed, I am—no. It's scary. You don't know what you're—it's a litigious world. People are suing everybody. People don't like to sign. People don't like to have everything recorded. Detective Sherwood says in his experience as an officer the same exact thing happens. People who are charged with crimes don't like to talk. Their mental filters start shutting down and/or opening up, I should say, and the—everything they say is—they say a lot less because they know they are being recorded or they are having to write something down."

Prosecutorial misconduct consists of the use of deceptive or reprehensible methods to persuade a judge or jury. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (*Ibid.*) No misconduct exists if a juror would have construed the statement to state or imply nothing harmful. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) A prosecutor may generally fairly comment on or argue any reasonable inferences from the evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) A prosecutor may not suggest the existence of "facts" outside the record by

arguing matters not in evidence. (*People v. Benson*, *supra*, 52 Cal.3d at p. 794.) However, counsel may state matters that are common knowledge or analogize to common experience, history or literature. (*People v. Wharton*, *supra*, 53 Cal.3d at p. 567.)

A review of the argument reveals no misconduct. The prosecutor did not refer to evidentiary matters outside the record, but simply analogized Sherwood's statements about his experiences with suspects to common experiences or attitudes that were likely to be more familiar to jurors than the subject of police interrogation. Flaws in the prosecutor's reasoning or choice of analogies simply weakened her argument and made it less persuasive. Reasonable jurors could readily conclude that the anxiety a person may experience when signing a waiver at a dentist's office or arguing a high-profile case before a full courtroom, including reporters, is not similar to a suspect's willingness to confess his crimes to a police officer in the presence of a tape recorder. Similarly, while the prosecutor's failure to address the surreptitious taping capabilities available at the police station weakened her argument, it was not improper. In his closing argument, defense counsel reminded the jury of Sherwood's admission that, had he used a different interview room, he could have taped appellant's confession without appellant observing the presence of a recording device. To the extent the prosecutor's argument was based on speculation regarding the argument the defense would make if there were a tape, we believe reasonable jurors would understand the argument was purely speculative and not infer from it anything harmful to appellant's case. Accordingly, no misconduct occurred in the above-quoted portion of the prosecutor's argument.

b. Argument regarding the procedure for obtaining the search warrant was misconduct; while defense counsel's failure to request an admonition bars the prosecutorial misconduct claim, the omission constituted ineffective assistance.

Defense counsel argued, inter alia, there was no evidence appellant lived at the residence searched pursuant to warrant. In her closing argument, the prosecutor responded, "Now, counsel says there is nothing to connect this defendant with the search warrant location. We have Detective Sherwood tell us that through his investigation he found out that the defendant was staying at the location where the search warrant was executed. You can't just walk into a judge's office and say sign this, I want to go search this place for this defendant's stuff. There is a legal procedure that detective—". The court interrupted counsel, saying, "Wait. Time out. That—that's not evidence either." However, the court did not admonish the jury to disregard the argument, and appellant did not ask it to do so.

Appellant correctly contends the prosecutor's argument regarding the procedure for obtaining a search warrant improperly referred to matters outside the record. The harmful nature of this argument lies in its suggestion Detective Sherwood possessed other information, not presented to the jury, linking appellant to the residence. (*People v. Benson*, *supra*, 52 Cal.3d at p. 794.) In this regard, it is significant the prosecutor argued Sherwood found out "through his investigation" that appellant stayed at the residence. During Sherwood's testimony about the search, the court sustained a hearsay objection when the detective said "he had information" about appellant's occupation of that residence. Sherwood subsequently testified appellant told him he had stayed there off and on. The prosecutor's choice of words in her argument resurrected the improper question and strongly suggested appellant's purported admission was simply one of several sources linking appellant to the residence.

On its own initiative, the court promptly halted this line of argument. At that

moment, defense counsel could have requested an admonition, as the court had already interrupted the prosecutor's argument and pinpointed the nature of the problem. Where an appellant complains of prosecutorial misconduct for the first time on appeal, we reach the issue of whether such misconduct caused a miscarriage of justice only if, considering the alleged misconduct in context, a timely objection and admonition would not have cured the harm. (See, e.g., *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.) Neither the prosecutor's comment nor any other aspect of appellant's case suggests reason to doubt the efficacy of an admonition to disregard the prosecutor's comment. Accordingly, appellant's prosecutorial misconduct claim regarding this aspect of the prosecutor's argument is barred.

Appellant argues counsel's failure to request an admonition constituted ineffective assistance of counsel. A claim counsel was ineffective requires a showing, by a preponderance of the evidence, the attorney's performance was objectively unreasonable and there is a reasonable probability that, but for counsel's errors, appellant would have obtained a more favorable result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Given the well-established requirement of a request for an admonition, the obvious impropriety in the prosecutor's argument, the strong suggestion in that argument of the existence of inculpatory facts not presented to the jury, and the trial court's intervention, defense counsel's failure to request an admonition was an objectively unreasonable error for which no satisfactory explanation is possible. The trial court's sua sponte interruption strongly implies it would have admonished the jury to disregard the argument had it been asked to do so. The absence of an admonition created a substantial risk the jury would infer from counsel's remarks the existence of additional evidence linking appellant with the residence searched. In actuality, the only evidence was Sherwood's testimony that appellant admitted staying at the house. Given the credible attack on Sherwood's testimony regarding appellant's confession, the

suggestion that other evidence linked appellant to the house was potent and highly prejudicial. Indeed, the prosecutor's argument implied that the other evidence linking appellant to the house was so persuasive it convinced a judge to issue a warrant to search that house. This created an additional risk that jurors would abdicate their fact-finding duty and accept the conclusion of the unidentified judge who issued the search warrant that appellant occupied the house. The potential for prejudice was somewhat reduced by the court's swift intervention, its statement that the prosecutor's argument was not evidence, and its subsequent instructions to the jury that the attorneys' statements were not evidence (CALJIC No. 1.02) and the jury must "determine what facts have been proved from the evidence received in the trial and not from any other source" (CALJIC No. 1.00). However, the potential for prejudice created by the prosecutor's statement and the virtual certainty that prejudice would have been cured make it reasonably probable that, but for defense counsel's error, appellant would have obtained a more favorable result on the counts to which the search results were relevant. Accordingly, counts four (grand theft of the BMW), six (unlawfully taking or driving of the Toyota) and ten (receiving the stolen Toyota) must be reversed.

c. The prosecutor's attempt to minimize the significance of the pager was not misconduct.

Appellant also complains the prosecutor mislead the jury when she argued the pager was irrelevant:

> "The pager. I told you the defense counsel was going to make an issue about the pager. The pager is insignificant to our case. If it was significant, we would have not given it—we wouldn't have given it back to Trista Curtis. It would be one thing if we said if there was a pager now in evidence that wasn't there before, and we were hanging our hat on the pager. We are not. It's insignificant. It was given back. It's not—we're not charging the defendant with anything based on the pager. We are not

saying he had a gun so and he had a pager and so the pager is connected to the gun. There is nothing. There is no issue about the pager other than we gave one back to Trista."

The argument was not misconduct and could not possibly have misled the jury. In his argument, defense counsel reminded the jury the evidence showed the pager was not purchased until the day after it was purportedly recovered from the Jeep, Officer Nibarger did not recall finding a pager, and neither the testimony nor the written inventory prepared by Officer Nibarger supported Sherwood's claim that the pager was found in the Jeep. Reasonable jurors would not be misled about the defense theory regarding the pager by the prosecutor's argument. They would instead understand it as a tacit admission that the prosecutor could not explain the discrepancy and was hoping the jury would ignore it.

3. Any discovery violation entailed in tardy disclosure that Randy Vera was a prosecution witness was harmless.

Appellant contends the prosecutor failed to timely reveal Randy Vera would testify for the prosecution. Although couched in terms of prosecutorial misconduct, appellant essentially complains of a discovery violation.

Penal Code section 1054.1 requires the prosecutor to disclose the following categories of information to the defense, if the prosecutor possesses the information or knows it is possessed by investigating agencies: the names and addresses of witnesses the prosecutor intends to call, the defendant's statements, relevant real evidence seized or obtained during the course of the investigation of the charged offenses, felony convictions of material witnesses, any exculpatory evidence, and relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial. Penal Code section 1054.7 requires the disclosure at least 30 days before trial.

The appellate record is unclear as to when the prosecutor informed the defense of

her intent to call Vera as a witness. The prosecutor told the court she did not know about Vera or originally intend to call him; she notified the defense of Vera's proposed testimony just before or after jury selection. On the other hand, defense counsel told the court he learned of Vera's existence when he saw his name on the prosecutor's witness list. The trial court nonetheless concluded there had been an untimely disclosure and instructed the jury the prosecutor had, "without lawful justification," violated her obligations by failing to timely disclose Vera as a potential witness and the nature of his proposed testimony.

In any event, appellant has not shown prejudice from any delay in disclosure. (*People v. Carpenter* (1997) 15 Cal.4th 312, 386.) He thoroughly cross-examined Vera, who provided limited evidence, and he was permitted to re-call Sherwood. In addition, the court informed the jury that the prosecutor had unjustifiably violated her duty of disclosure regarding Vera, and the "weight and significance" of the delayed disclosure was a factor for the jury's consideration. Thus, the prosecutor's violation of a statutory discovery duty, if any, was harmless.

The prosecution also has a constitutional duty to disclose to the defense any and all potentially exculpatory evidence. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) The defendant must establish that the undisclosed information was favorable to the defense and there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. (*Kyles v. Whitley* (1995) 514 U.S. 419, 433-434.) Such a reasonable probability exists where the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Id.* at p. 435; *In re Williams* (1994) 7 Cal.4th 572, 611.)

Neither Vera's presence during appellant's confession or any of his brief testimony regarding the confession constituted information favorable to the defense. Thus, the prosecutor did not violate a constitutional duty of disclosure. Moreover,

appellant has not shown any probability he would have obtained a more favorable result if Vera's existence and the nature of his proposed testimony had been disclosed to the defense at an earlier time.

4. Appellant was improperly convicted of both stealing the Jeep and receiving it as stolen property.

Generally, a person may not be convicted of stealing and receiving the same property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757.) Appellant and respondent agree conviction of one of the counts pertaining to the Jeep—grand theft in count five or receiving stolen property in count eight—must be reversed. Accordingly, we reverse count eight, on which the trial court stayed punishment.

5. Appellant's remaining contentions need not be addressed.

Appellant also contends his attorney rendered ineffective assistance by eliciting Sherwood's testimony that one of the residents of the house searched told him appellant left the telephone bill there, failing to object to Sherwood's testimony on that point as non-responsive[8], and waiting until closing argument to ask appellant to stand to show his height.[9] However, as appellant argues, the effect of the alleged errors is limited to counts six and ten, which pertain to the Toyota. Because we reverse these counts for the reasons previously discussed, we need not address the ineffective assistance claims.

Appellant also contends his convictions must be reversed for cumulative error. Because we previously found each error that occurred was prejudicial, we need not address their cumulative effect.

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[8] Defense counsel asked Sherwood how he knew the phone bill belonged to the person whose rust-colored SUV had been stolen. Sherwood testified he did not know the connection at that time, but he asked the resident, who said appellant left the bill behind.

[9] The court did not allow appellant to stand because he had not stood during the presentation of evidence. Counsel was trying to show that appellant was much taller than the thief described by Castellanos.

DISPOSITION

The judgment is reversed with respect to counts four (grand theft auto), six (unlawfully taking or driving a vehicle), eight (receiving stolen property) and ten (receiving stolen property). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BOLAND, J.*

We concur:

JOHNSON, Acting P.J.

WOODS, J.

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* Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned to Division Seven by the Chief Justice pursuant to article VI, section 6 of the California Constitution.